United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1154

ORIGINAL

To be argued by
JOHN H. DOYLE, III

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

HOWARD FINKELSTEIN, a/k/a ROBERT HOWARD, ANTHONY SCARDINO, ALAN SEGAL and EDWARD ZUBER,

Appellants.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLANT, ALAN SEGAL

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Fed. Rules Crim. Pro., Rule 48(b)

Dismissal

* * *

(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against defendant who has been held to answer to the district court or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

Fed. Rules Evid., Rule 609

Impeachment by Evidence of Conviction of Crime

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs it prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

* * *

The Questions Presented For Review

1. Did the trial court err in permitting the Government to introduce against defendant, on the ground that defendant had "opened the door" in cross-examining a witness, the text of a 1959 New York State Supreme Court civil injunction barring defendant from the securities business, after the Government had failed to elicit from the witness on redirect any testimony about the injunction that touched upon any area developed on cross-examination?

2. Was reversible error created by the prosecutor's arguing to the jury that defendant had violated the civil injunction, after the injunction had been received by the Court only on the question of whether it tended to explain the use of nominees in business transactions by defendant, and defendant had not been charged with any such violation in the Indictment.

3. Was reversible error created by the prosecutor's distortion of the provisions of the civil injunction in his argument to the jury, in that the prosecutor erroneously told the jury that defendant was prohibited from "transacting in securities", whereas in fact he was enjoined only from dealing with the public in the business

of buying and selling securities and from acting as a broker-dealer?

4. Did the trial court commit reversible error in refusing to strike the testimony of three witnesses who purchased Pioneer stock when there was no evidence that they purchased such shares on the recommendation of any person acting in concert with defendant, directly or indirectly?

5. Did the trial court err in failing to enter a judgment of acquittal as to defendant on all counts in which he was named, by reason of a material variance between the indictment, which charged a single conspiracy, and the proof, which established two distinct and separate conspiracies?

6. Did the trial court err in charging the jury that it could find a single conspiracy if it found that "two or more" of the defendants came to a mutual understanding on the broad objectives of the conspiracy, thus leading the jury to believe that it could find defendant guilty of being a member of a single conspiracy even if it found that two or more other defendants had joined a wholly different conspiracy in which defendant was not involved?

7. Should the indictment have been dismissed because of unnecessary delay in presenting the case to the grand jury, after four and a half years had elapsed from the time the Securities and Exchange Commission started

its investigation to the date of the filing of the Indictment, and defendant as a result was unable to produce the necessary documents and witnesses to support his defense of good faith?

8. Did the trial court err in curtailing cross-examination of a key Government witness so as to prevent defendant from establishing the nature of a criminal act of the witness that had resulted in a federal conviction for wire fraud in 1974?

STATEMENT OF THE CASE

1. Nature of the Case

Defendant-Appellant Alan Segal ("defendant") appeals from a judgment of conviction entered on March 31, 1975, by United States District Judge Lloyd F. MacMahon sentencing defendant to serve concurrent sentences of three years on each of 28 counts, after a jury trial before Judge MacMahon that resulted in verdicts of guilty on those counts on December 12, 1974.

2. The Proceedings and Dispositions Below

Indictment 74 Civ. 908, in 46 counts, was filed on September 24, 1974, charging defendant in 39 counts. The indictment also named Burney Acton and Michael Clegg, each in 33 counts; Joseph Azzerone, Howard Finkelstein, a/k/a Robert Howard, Jack Levine, and Edward Zuber, each in 31 counts; and Richard McKibbon and Anthony Scardino, each in 37 counts. The co-defendants Acton and Clegg pleaded guilty to counts 1 and 2 of the indictment and co-defendant Azzerone pleaded guilty to count 1 of the indictment. The co-defendant McKibbon has not appeared to answer the indictment.

The trial of the indictment against defendant and against co-defendants Finkelstein, Levine, Scardino and Zuber commenced on December 2, 1974 and lasted nine days. At the close of the Government's case, judgments of acquittal

were entered as to co-defendant Levine on all counts in which he was named. Co-defendant Finkelstein, a/k/a Howard, was convicted on 2 counts, co-defendant Zuber was convicted on 1 count, co-defendant Scardino was convicted on 10 counts, and these co-defendants were found not guilty on the other counts that went to the jury.

Defendant is presently enlarged on a personal recognizance bond of $50,000 secured by $2,500 cash.

STATEMENT OF FACTS

I. The Offenses Charged in the Indictment

A. The Conspiracy Count

The indictment contained a conspiracy count and 45 substantive counts. The conspiracy count charged all nine defendants, and 10 unindicted co-conspirators, with conspiring to violate certain statutes, to wit, Title 15, United States Code, Sections 77e(a), 77q(a), and 77x, Rule 10b-5 (17 CFR 240.10b-5) of the rules and regulations promulgated by the United States Securities and Exchange Commission ("SEC") under the Securities Exchange Act of 1934 ("Exchange Act"), and Title 18, United States Code, Section 1341.

The indictment concerned the sale of unregistered stock of Pioneer Development Corporation ("Pioneer") which occurred from on or about August 1, 1969 up to and including December 31, 1970. The object of the conspiracy was to

secure control of the Pioneer stock, establish an artificial market in the stock through various manipulative devices, and then to sell, pledge and distribute the Pioneer stock at artificially high prices in order to fraudulently obtain money at purchasers' and lenders' expense (JA 9-10).*

Named as co-conspirators, but not as defendants, were George Aaron, William Casey, Leonard Close, Michael Gardner, Michael Karfunkel, Sheldon Lamb, Eddie Levine, Don Ross, Stuart Schiffman and Don Shepherd (JA 10).

The means by which it was alleged that the conspiracy would be carried out were the co-defendant Acton would acquire large shares of Pioneer stock, defendant would take the stock to New York to create an artificial market in it, and then all defendants would take advantage of the artificially created price in the stock for their own benefit (JA 10).

According to Count One of the indictment, in early 1969 Acton obtained control of the books and records of Pioneer, a dormant corporate "shell" without substantial assets and with approximately 500,000 unregistered shares originally issued and outstanding. Acton and co-conspirators Aaron and Casey collected thousands of shares of Pioneer from existing shareholders, at little or no cost, by misrepresenting that the stock retained by those shareholders

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* Page references following the letters "JA" refer to pages of the Joint Appendix.

would increase in value. Acton and Clegg then became Secretary and President, respectively, of Pioneer (JA 10).

Acton and Clegg then gave approximately 111,000 unregistered Pioneer shares to defendant to enable defendant to create an artificial market in Pioneer stock and distribute the stock to the public. Defendant allegedly took these shares from Reno, Nevada to New York City to create the artificial market and distribute the unregistered shares (JA 10).

Co-defendants Acton and Clegg, and co-conspirators Lamb, Shepherd and Ross allegedly arranged to place into Pioneer assets of insubstantial value, which assets were later allegedly misrepresented to investors by defendant and co-defendant Levine as having substantial value and proven worth. Defendant and co-defendants Levine and Azzerone allegedly manipulated and inflated the price of Pioneer stock by various artificial means, including co-defendant Azzerone's opening the stock at $5.00 per share upon instructions by defendant, defendant and co-defendant Levine's touting and making false and misleading claims about Pioneer to investors to create artificial demand in the stock, defendant's causing people to make purchases upon the assurance that defendant would cover any losses sustained, and defendant's directing trades to support the market in Pioneer (JA 11).

Count One further alleged that all defendants would distribute and make use of unregistered Pioneer stock at artificially inflated prices for their own benefit and gain by engaging in certain enumerated transactions. These transactions included the sale by defendant of an aggregate of 40,500 unregistered Pioneer shares through New York City brokerage firms; the sale of 24,900 such shares by certain co-defendants through a brokerage firm in Denver the sale by Acton and Clegg of 1,000 such shares through a Los Angeles brokerage firm; the placing of an aggregate of 13,550 shares by defendant as collateral for various bank loans; the sale by Finkelstein of 10,000 shares; the trading by Acton, Finkelstein and Zuber of 6,900 shares in return for 7 fur coats; and the use of threats of violence by Zuber acting as defendant's representative to recover compensation for the sale of certain stock by Scardino and McKibbon (JA 11-13).

Fifty-four overt acts were alleged to have been committed in furtherance of the single conspiracy ranging in date from October 24, 1969 until February 24, 1970 (JA 13-14).

B. The Substantive Counts

Count Two

Count Two charges defendant, Acton, and Clegg with unlawfully, wilfully, and knowingly carrying or causing to

be carried in interstate commerce and through the mails, approximately 111,000 unregistered shares of Pioneer stock for the purpose of sale in violation of Title 15, United States Code, Sections 77e(a)(2) and 77x and Title 18, United States Code, Section 2 (JA 16).

Count Three

Count Three charges defendant alone with carrying or causing to be carried through the mails in interstate commerce between Reno, Nevada and New York City, approximately 20,000 unregistered shares of Pioneer on or about November and December of 1969, for the purpose of sale and delivery after sale in violation of Title 15, United States Code, Sections 77e(a)(2) and 77x and Title 18, United States Code, Section 2 (JA 16-17).

Count Four

Count Four is a substantive count charging only Scardino and McKibbon (JA 17).

Counts Five through Sixteen

These counts charge various defendants with using means and instruments of transportation and communication in interstate commerce and of the mails to sell unregistered Pioneer stock on various specified dates in violation of Title 15, United States Code, Sections 77e(a)(1) and 77x and Title 18, United States Code, Section 2. Counts 5-10 charge

defendant with specific acts in violation of the statutes. Counts 11-14 and 16 charge Scardino and McKibbon with similar acts. Count 15 names Acton and Clegg. Each of the twelve specified events constituting the various counts involve the mailing or wiring of confirmation slips (JA 17-18).

Counts Seventeen through Twenty-Nine

These counts charge defendant, Acton, Azzerone, Clegg, Howard, Levine, McKibbon, Scardino and Zuber with using means of interstate commerce and the mails in the offer and sale of Pioneer stock (a) to employ devices, schemes, and artifices to defraud, (b) to obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make statements made, in light of the circumstances in which they were made, not misleading, and (c) to engage in acts which would and did operate as a fraud and deceit upon purchasers of Pioneer stock in the offer and sale of such stock, in violation of Title 15, United States Code, Sections 77q and 77x and Title 18, United States Code, Section 2 (JA 19-20).

Counts Thirty through Forty-Six

These counts charge defendant, Acton, Azzerone, Clegg, Howard, Levine, McKibbon, Scardino and Zuber with utilizing the mails for the purposes of executing a scheme to defraud purchasers of Pioneer stock, and to obtain money

and property from said persons by means of false statements in violation of Title 15, United States Code, Section 1341 and Title 18, United States Code, Section 2 (JA 20-22).

Defendant was found guilty and sentenced on Counts 1 through 3, 5 through 10, 17 through 19, 21 through 23, 28 through 30, 32 through 34, 37, 39 through 41 and 43 through 45.

II. The Evidence at Trial

A. The Government's Case

Following is a summary of the testimony of the Government's witnesses:

1. Burney Acton

Burney Acton, who had pleaded guilty to Counts 1 and 2 of the indictment and was awaiting sentence at the time of trial, testified that during the Spring of 1969, he and Michael Clegg, along with George Aaron, Bill Casey, Roy Lewis and others were acquiring stock in Pioneer Development Corporation ("Pioneer") from its stockholders. Pioneer had been incorporated in the State of Nevada in 1918 and had a continuous corporate existence up to the time of trial. By April 21, 1969, the Acton-Clegg group had accumulated approximately 200,000 Pioneer shares out of 515,400 shares outstanding (JA 300, 205, 303, 209, 212).

During the Spring and Summer of 1969, Acton discussed

Pioneer with Anthony Scardino, who suggested that Acton meet with defendant who might help him raise money for Pioneer. Shortly thereafter, a meeting was arranged in Dallas, Texas and attended by Acton, Clegg, Scardino and defendant in late summer, 1969. (JA 214, 216, 217).

At this meeting Clegg said that his group had a stockholders' list and that they needed help in raising some money to operate Pioneer. Clegg and Acton gave defendant a report on the Lone Tree Mining Company which owned a mercury mine in Nevada that they were seeking to acquire for Pioneer. Acton and Clegg also gave defendant a number of assay reports on ore taken from the mine, and some material on a company called Precise Power Corporation ("Precise Power"). They told defendant that the mine was not in operation and that Pioneer would need approximately $500,000 to put it into operation. Defendant said that he had a lot of strength in the stock market and that he would be interested if the stock could "open" at $5 a share (JA 217, 218, 229, 219, 221).

In late September or October, 1969, defendant and Stuart Schiffman, an attorney who represented defendant, went to Los Angeles for a meeting at the Century Plaza Hotel with Acton, Clegg, and Jay Walker, a business associate of Clegg and Acton. Clegg and Acton showed defendant reports on the mercury mine and Precise Power. Defendant asked for more information and suggested that another meeting

be held in Reno, at which time Clegg and Acton would give defendant some Pioneer stock which he would take to New York and open up for trading. Defendant said that Clegg and Acton would be able to obtain loans once they got the stock trading. Defendant told Acton and Clegg not to sell any of the Pioneer stock which they retained because such sale would affect the market price. Acton and Clegg said that they would continue their efforts to acquire stock from the remaining shareholders of Pioneer (JA 223-227).

On October 23, 1969, defendant, Acton, Clegg and Sheldon Lamb, the owner of the mercury mine, met at the Riverside Hotel in Reno, Nevada. Lamb was a rancher whose brother Ralph was Sheriff of Las Vegas County and whose brother Floyd was senior State Senator of Nevada. At this meeting Lamb gave defendant a mining report. Later that same day they went to the Nevada Agency and Trust Company, Pioneer's transfer agent, where Acton gave 56,550 shares of Pioneer to defendant. These shares were in the names of the following individuals: 30,000 shares - Francine "Zolt" (a misspelling of the name of defendant's secretary, Francine Zahl); 4,500 shares - Bill Morgan; 20,000 shares - Ermanno Mariot; and 2,050 shares - Herb Kaighan.* Upon receiving the stock, defendant gave Lamb a check for $20,000 to pay

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* Morgan, Mariot and Kaighan were relatives of Clegg whose stock Clegg wanted defendant to sell on their behalf.

for mine operation expenses (JA 228 - 230) (GX 1A).*

Shortly after this meeting, Clegg agreed with Acton that Clegg would try to arrange for the transfer of a 100,000 share certificate in the name of the estate of Van Der Steen (JA 233).

On October 29, 1969, Acton and Clegg completed the acquisition of Precise Power by Pioneer in exchange for 600,000 shares of Pioneer restricted stock. Precise Power owned some patents but was not producing any revenues (JA 236, 237).

Later that week Acton learned from Lamb that defendant's $20,000 check had been returned for insufficient funds. Defendant told Clegg that he did not understand why this had happened and stated that it would be taken care of immediately (JA 238).**

On November 3 or 4, 1969, Acton met with Scardino at the Riverside Hotel to discuss possible financing of Pioneer. Acton told Scardino that Pioneer stock was now trading and listed on the pink sheets, and asked Scardino if he could borrow money on the stock, explaining that he could not sell the stock by reason of his promise to defendant. Scardino said that he needed some money and Acton

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* The letters "GX" denote exhibits introduced by the Government; the letters "DX" denote defendant's exhibits.

** Although the check was not made good, defendant tried to help Lamb raise money by introducing him to a bank officer of a bank in Boston (JA 333).

agreed that Scardino would receive $7,500 of the proceeds if he could help in arranging a loan on the stock. Scardino reported a day or so later that they could borrow money in Tucson "through a trust of some type" (JA 239, 253, 241, 254).

During the first week of November, 1969, Clegg told Acton that he had obtained the required signatures for the transfer of the Van Der Steen stock. Acton then gave 5,000 shares from the Van Der Steen block to Scardino for the loan and took 55,000 shares in the name of Francine Zahl to defendant in New York City (JA 255, 259, 260).

A week later Acton learned that the Tucson loan being arranged by Scardino had fallen through. A few days later Scardino told Acton that another loan had been arranged and that Richard McKibbon, one of Scardino's employees, had taken the stock certificate. On November 12, 1969, Acton received a cashier's check for $13,000 from McKibbon representing proceeds from the loan (JA 263-265).

In late November, 1969, Clegg received a phone call from defendant who said he believed that the stock put up for the loan had been sold, in violation of the agreement of Acton and Clegg not to sell Pioneer stock. Following that conversation, Acton and Clegg flew to Houston and met with Scardino who assured them that the stock had not been sold. At the same meeting another loan on Pioneer stock was discussed. On approximately November 14, 1969, Clegg gave

McKibbon another 6,000 shares, which originated from the Van Der Steen block, upon which Scardino was to borrow more money (JA 266-270, 273, 271).

On December 3, 1969, a Board of Directors meeting of Pioneer was held in Reno and attended by Acton, Clegg, Lamb and Don Ross. The minutes of that meeting revealed that Pioneer acquired the Lone Tree Mining Company at that time (JA 276, 277).

On December 30, 1969, at a meeting attended by Acton, Clegg and Don Shepherd, it was agreed that Pioneer would receive $600,000 worth of debentures of Pioneer Casualty Company in exchange for 200,000 shares in restricted Pioneer stock. Shephard furnished his financial statement at the meeting and stated he would personally guarantee repayments of any loans that they would get on the debentures (JA 279, 280).

Sometime between Christmas 1969, and New Year, Acton received a visit from Edward Zuber at Acton's home in Los Angeles. Zuber said that they had to go to a meeting to straighten out the Pioneer stock situation. Zuber, Howard and Acton took a plane to Reno and during the flight Acton noticed that Zuber was carrying a gun. Acton, Zuber, Howard, Scardino, McKibbon, and one Glazer went up to one of the rooms and Zuber stated that he wanted to find out who was selling stock. McKibbon tried to explain the situation

but Zuber accused him of lying. A "slight altercation" occurred in the course of which Zuber struck McKibbon, with the result that McKibbon admitted having sold the stock. Zuber stated that he wanted the money and Scardino assured him that he would certainly repay the money he had received out of the loan. Zuber neither displayed nor mentioned the gun during the meeting (JA 284, 285, 287, 292, 290, 291, 356).

In January 1970, at a meeting attended by Acton, Zuber and Howard in Los Angeles, Zuber and Howard stated that they could raise money on the stock and the debenture bonds if Acton would bring them to New York City. On January 7 or 8, Acton went to New York and met with Howard who said he had some appointments set up for the purpose of raising money for Pioneer. On January 9 or 10, 1970, Acton, Zuber and Howard went to the office of Alan Grant, a furrier, and traded 6,900 shares of Pioneer stock for three fur coats. One coat was given to Shepherd, one to Clegg, and one was kept by Acton (JA 293-296).

On March 15, 1970, a meeting was held in Reno at which time a group consisting of Louis Marder, Herbert Coxe and Martin Horowitz acquired control of Pioneer. The Marder group received all of the assets of Pioneer except for an $35,000 American Aluminum note (JA 298) (GX 12).

On cross-examination Acton stated that he believed

in good faith that the assets of Pioneer, particularly the Lone Tree Mining claims, were valuable. Acton knew Lamb very well and he believed Lamb's favorable evaluation of these claims. In this connection Acton relied upon various reports shown to him by Lamb. Acton identified the location certificates for the claims filed in Churchville County. Lamb had told Acton that the Howard Hughes organization had offered millions of dollars for the mine claims but that Lamb had turned them down because he felt that the offer was insufficient. Acton was shown a report by a Mr. Hatsis, a representative of the Hughes companies, documenting the offer (JA 304-306, 308) (DX B).

From November 1969 through February 1970 Acton had numerous conversations with Myron Buttram, a mining expert who owned the Cully mill process for refining mercury ore. In January or February of 1970, this equipment was actually installed at the mine site. On or about January 19, 1970, defendant met Mr. Buttram, who explained this process to defendant and expressed his optimism that it would work at the location of the Lone Tree mine site (JA 309-311).

Although there was no commercial production from the mine, quantities of ore were extracted for purposes of testing and the assay reports were included in the materials given to defendant and Schiffman who were to take them to a broker in New York (JA 342).

In January 1970, Acton invited the defendant Finkelstein to the mine where they met Buttram. Finkelstein visited the mine and stayed there for a few days and saw there was equipment at the mine and work was going on digging up the soil. Acton had an understanding with Finkelstein that when the mine became operational Acton could work as a salesman for the mining company. Buttram discussed with Acton and Finkelstein the process of extracting mercury from the ore and the quality of the ore in the area, and Acton believed Buttram was qualified as an expert in the field. Acton later moved out to the site and tried to work the mine with Clegg. He also entered into a partnership agreement with Lamb and Clegg to continue operation of the mine claims after Pioneer had resold them (JA 381-84. 312).

Acton believed that because Pioneer was a 1918 corporation and had shareholders holding shares issued prior to 1933, the shares could be freely traded without a registration statement. Acton had been told by Dwain Knigge, of the Nevada Agency and Trust Company, that shares not bearing the legend "restricted" could be freely traded. (JA 313-315, 318).

Acton and Clegg turned over to Schiffman or defendant a group of documents about Pioneer consisting mainly of technical reports about the mine together with

the Hatsis report and other materials which had been assembled in connection with the mine claim. Defendant and Schiffman said that they were going to turn the file over to a broker in New York in order to open the stock at $5 a share. Acton stated that he did not feel that there was anything wrong in what he had done. Acton admitted that his recollection of some of the events was very "hazy" (JA 320-322, 326).

2. Michael W. Clegg

Michael W. Clegg, who pleaded guilty to counts 1 and 2 of the indictment and was awaiting sentence at the time of trial, testified to the same series of meetings discussed by Burney Acton. At the Dallas meeting an arrangement was discussed whereby defendant would get half of the stock collected for trading in the market, and the other half would be used to raise operating capital. Defendant would provide $500,000 operating capital for the mine to get into operation. Defendant was to open up the stock and "support" it so that it would not decline in value. Defendant said that there would be a number of brokers that he believed would support the stock, and cautioned that the other half of the shares of stock could not be sold without his permission although they could be used for loan purposes. If the other stock hit the market, it would depress the value of the market (JA 537, 625, 539, 541, 544-549).

Clegg remembered the meeting in the Century Plaza Hotel, but not when it occurred nor who was present other than himself, Acton and defendant. Defendant said at the meeting that he needed to keep the "shoe box" on the stock, meaning the control of the stock, so it would hit the market only on a planned basis (JA 550-553).

Clegg also attended the October 23, 1969 meeting held at the Nevada Agency and Trust Company, at which time 56,550 shares of Pioneer were transferred. At that meeting Segal wrote out a check for $5,000 or $6,000 to the transfer agent to clear up past debts of Pioneer. (JA 561-563, 565. 566, 571, 564).

With regard to the acquisition of the shares held by the Van Der Steen estate, Clegg said that the attorney for the trust had been persuaded to sell the stock for ten cents a share and that defendant wired the money to pay for these shares (JA 578).

Between Christmas, 1969, and New Year, Clegg was visited by Zuber who told Clegg that if he did not pay defendant the $200,000 owed defendant because stock had been sold it was not going to be very pleasant for Clegg. Clegg protested that there had been a mistake and immediately called defendant. Defendant explained that a great deal of stock had hit the market, that the shares were originally in the name of Jay Walker and were then transferred to Tony Scardino. Defendant accused Acton and Clegg

of selling the stock. Clegg told defendant that he had given the stock to Scardino to set up a loan and that defendant should see him about the money. Defendant did not furnish $500,000 to Pioneer. (JA 590, 592, 591, 594, 597, 599, 601, 702).

On cross-examination of Clegg, it was brought out that he had told defendant Zuber's counsel on November 24, 1974 that his memory on these events was extremely poor and that he had only vague recollections. (JA 608-610).

Clegg testified that Pioneer's attorney, Ted Frasier, had told him that a registration statement was not required because of the "grandfather clause and pre-SEC trading".* The attorney told him that the shares of the stock were free trading. No facts were given to the attorney in Clegg's presence, but Clegg was sure that Acton had

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* Section 3(a) of the Securities Act of 1933, 15 United States Code, Section 77c, provides, in pertinent part:

"EXEMPTED SECURITIES

(a) Except as hereinafter expressly provided, the provisions of this subchapter shall not apply to any of the following classes of securities:

(1) Any security which, prior to or within sixty days after May 27, 1933, has been sold or disposed of by the issuer or bona fide offered to the public, but this exemption shall not apply to any new offering of any such security by an issuer or underwriter subsequent to such sixty days; * * * "

told the attorney about the plan to acquire stock from the existing shareholders (JA 620, 622).

Based on his review of the assay reports and his visits to the mine, Clegg believed that if they could make the mine profitable, they could get Pioneer off the ground. In January, 1970, Clegg, Acton and Finkelstein visited the mine. When they were there they saw a small furnace and a bulldozer on the side and observed Buttram experimenting with the Cully mill. Clegg saw some geological reports prepared by the engineers which indicated that there was a rich quantity of mercury per ton of ore at the site. Clegg had personally invested in excess of $100,000 in the mine and after he terminated his association with Pioneer in 1970, he moved out with his family to work the mine site. Defendant paid ten cents a share for the Van Der Steen stock and paid $6,500 transfer fees on the stock (JA 622, 623, 631, 633-635, 624, 623, 642, 647, 666, 667).

On cross-examination by counsel for defendant, Clegg testified that he had been convicted of wire fraud in Houston in 1974 and was sentenced to five years' imprisonment* (JA 647, 648).

Clegg denied that he had sold a thousand shares of Pioneer through Grimes Hopper & Messer in Los Angeles and maintained that those shares were sold by Jay Walker (JA 644, 1144, 1148).

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* See Point V infra

3. Stuart Schiffman

Stuart Schiffman, defendant's attorney, testified that early in the Fall of 1969, he attended the meeting at the Century Plaza Hotel in Los Angeles to look at a business investment for Kelli, Jackson & Scott, a company owned by defendant (JA 422-425).

Around October 23, 1969, defendant asked Schiffman if he could find a stock brokerage firm that would be willing to trade Pioneer stock. A few days later defendant delivered a "due diligence file" to Schiffman, consisting of all the technical materials and reports that defendant had been given by Acton, Clegg and Lamb. Schiffman later took the file to Joseph Azzerone, the principal of a brokerage firm called Karen and Company ("Karen") (JA 427, 428).

Schiffman asked Azzerone if he would be willing to trade in Pioneer stock. Schiffman told Azzerone that a form had to be filed with the National Quotation Bureau to obtain approval for the stock to be traded in the pink sheets. Schiffman filled in bid and asked prices of $5 and $6 respectively on the form, which figures he had received from defendant. Schiffman said that Ms. Zahl, defendant's secretary, would have some stock for sale. Defendant told Schiffman that Zahl was going to be the seller of the stock, that she would open up an account with Karen, and deposit stock with it (JA 427, 429-432).

On December 15, 1969, a Boston bank requested further collateral or reduction of a loan that had been taken out by Schiffman and by Leonard Close, an associate of Schiffman's, on behalf of Kelli, Jackson & Scott, a company of defendant. Defendant sent 2,000 shares of Pioneer stock to the bank as additional collateral for the loan. Defendant also sent Pioneer stock to the First Industrial Bank of Boston when additional collateral was required on a loan obtained by Close and Schiffman on behalf of Kelli, Jackson & Scott in October 1969. Defendant did not tell Schiffman about the distribution or sale of any Pioneer stock by defendant or others, beyond the amount that Schiffman delivered to Karen to sell (JA 434, 435, 438, 440) (GX 28(e), 27(e)).

On cross-examination, Schiffman testified that securities law was one of his specialties. He also testified that while in Los Angeles he met with Fred ("Ted") Frasier, the attorney for Pioneer, who said in defendant's presence that stock in Pioneer was freely trading under the "grandfather clause" because the stock had been issued prior to 1933 (JA 445, 446, 451).

Schiffman stated that the mining report was a portion of the due diligence file and that the last time he had seen the due diligence file was when he gave it to Azzerone. Schiffman never told defendant that there was

anything illegal about the transaction at Karen (JA 461, 462, 464) (GX 68).

Defendant and Schiffman thought Pioneer was a very good company and Schiffman indirectly purchased some shares, and recommended the stock to his cousin who purchased some shares. In December of 1969 or January of 1970, defendant told Schiffman that he had commenced purchasing additional shares of Pioneer (JA 466, 467).

In the Fall of 1969 defendant explained to Schiffman that he used nominees because of the problem of claims that creditors might levy against assets and accounts under his own name. On redirect examination, the Government introduced over objection a 1959 New York State civil injunction against defendant (JA 471, 476-478).*

4. Joseph Azzerone

Joseph Azzerone, who was a proprietor of Karen, was visited by Schiffman in October of 1969 when they discussed trading in Pioneer stock. Schiffman told Azzerone that he would be told daily what prices to put on the pink sheets and that he would be "protected" on both sides because if he sold stock, he could purchase it from the Zahl account at a lower price and thus would make between a quarter to a half a point on such transactions (JA 509, 512).

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* See Point I infra.

A couple of months after stock began trading, Schiffman told Azzerone that Zahl was a nominee of defendant. After that point, when Azzerone called Zahl, defendant would get on the phone, and Azzerone would tell him how many shares he bought and sold during the day (JA 520).

On cross-examination Azzerone testified that he had turned over the due diligence file to the SEC, and that he has not seen it since that time. After Azzerone put quotes into the pink sheets, bids for the purchase of Pioneer shares came from about fifteen different brokerage firms in New York City and elsewhere (JA 530, 528, 532).

5. Francine Zahl

Francine Zahl, who was defendant's secretary, testified that starting in June of 1969 she acted as a nominee for defendant, who bought and sold stocks. Ms. Zahl was Secretary-Treasurer of Bonafide Productions, a company formed by defendant. Ms. Zahl had a lot of shares of Pioneer in her name. Defendant showed Ms. Zahl the shares that were in a box located in his office in New York City. Ms. Zahl delivered some shares of Pioneer to Karen and Orvis Brothers & Co., and she called Mr. Azzerone of Karen to place buy or sell orders at defendant's instruction. Other nominees of defendant were Florence Glans, his mother-in-law, and Jeffrey Howard, his son (JA 693-697, 701-703).

On cross-examination, Ms. Zahl testified that she never gave any "bid" or "asked" prices to Azzerone (JA 711).

6. Dwain Knigge

In the Fall of 1969 Dwain Knigge was employed in the stock transfer department of the Nevada Agency and Trust Company. Knigge testified that if a stock certificate bears no legend and their records are not marked and do not note that the individual is a control person, the transfer would be effected (JA 714, 716, 725).

7. Investor and Creditor Witnesses

Ben Cohen, a resident of Miami, testified that he was a good friend of defendant, whom he had known since about 1967. Just prior to December 23, 1969, defendant said to Cohen that he thought Pioneer was "all right" as an investment and asked Cohen to do him a favor and buy some of the stock for him. Cohen agreed to do so and purchased approximately 3,000 shares for defendant, to whom he sent the certificates upon receipt (JA 675-677).

In April, 1970, Cohen received payment from defendant of roughly $11,000 against a total purchase price of $21,000 for the Pioneer stock. The balance due is still outstanding (JA 678).

S. Zachary Swidler, an attorney and certified public accountant, had had many business dealings with defendant, who owed Swidler approximately $15,000 in November, 1969. Defendant said to Swidler at that time that Pioneer stock had good potential and that defendant was

relatively optimistic about the stock. Defendant showed Swidler a balance sheet on Pioneer. When Swidler requested payment by defendant of the amount owed to Swidler, defendant gave Swidler 2,000 shares of Pioneer stock which he said Swidler could use as collateral to obtain a loan. Swidler did obtain a bank loan in the amount of $10,000 and gave defendant $5,000. On cross-examination, Swidler, who had reviewed thousands of financial statements, said he had looked at the balance sheet on Pioneer shown to him by defendant very quickly and did not take it seriously (JA 680-84, 691, 692).

Sol Fingar, who was self-employed in the dress manufacturing business in 1969, testified that he bought 2,000 shares of Pioneer at $8.00 per share on November 10, 1969 and 1,000 shares at $6.75 per share on December 11, 1969. Fingar made his purchases upon the recommendation of Eddie Levine, who was deceased at the time of trial. Eddie Levine had been a textile salesman who called upon Fingar's company and sold materials to them. Eddie Levine stated that Pioneer was a mining stock and that the price would go up. Fingar understood that it was a speculative investment (JA 765, 767, 771, 768, 772, 773).

Robert Meyer, President of United Textile & Fashion Novelty Corporation, testified that he purchased 1200 shares of Pioneer on the recommendation of Abner Berman on November

10, 1969. Later in November and in December, 1969 Meyer purchased 600 additional shares. After making these purchases, Meyer telephoned defendant and made an appointment with him to discuss Pioneer. Meyer asked defendant for a financial statement of Pioneer. Defendant said that the accounting firm had them and they should be out in the "next few days". Defendant and Jack Levine went to a bar nearby with Meyer, where defendant said that he thought Pioneer would do well, that there were some blocks of stock that were keeping it from going up because they were being "unloaded" and that there was a Government contract coming through on "mobile heaters or something" that "would be used on the trailer type of mobile home units". Defendant said that the mine would be in operation very shortly and that it should be producing quicksilver on a profitable basis. Defendant said that the firm was trying to raise additional funds for removing the ore and that the earnings of the company would be good and the stock should go up when the earnings come out from the company. Defendant said that he felt the stock would be back in the "9-10 area" in a very short period of time and he suggested that Meyer hold his stock because it was a good investment at the time (JA 843, 845-847, 849, 852-854).

After Meyer's conversations with defendant, Meyer bought some additional stock while the price was going down. Meyer later paid a second visit to defendant, at which time

defendant said that he had a great deal of faith in the company; they would get the situation going again, the stock price should go up and there was still a block of stock overhanging the market. Defendant said that there were some people out West that were depressing the market. Meyer was purchasing stock at Orvis Brothers & Co. as well as another broker. In March, 1970, Meyer continued to buy Pioneer stock at the depressed price of $1-2 per share. Meyer spoke about Pioneer with the transfer agent in Nevada as well as with Clegg, whom he described as the President of the Company (JA 856-859, 869, 870).

On cross-examination, Meyer testified that defendant did not represent himself to be an officer of Pioneer but merely an investor who was very close to the company. Meyer described his continuing purchases of Pioneer stock during the early part of 1970 at progressively lower prices as "averaging down". Averaging down is a practice engaged in when an investor believes that a stock will finally go up. Defendant told Meyer that Pioneer was a speculative stock and also stated that Sheldon Lamb was the owner of the mining claim. Meyer tried to reach Sheriff Lamb in connection with Pioneer (JA 872-876)

Abner Berman testified that he was the principal of Ber-Lee Fabrics and in October, 1969 was the owner of Renba Fabrics. On or shortly before October 30, 1969, Berman spoke to one of his salesmen, Eddie Levine, who told

him that his father and some other gentlemen were in on some stock deals and that the stock will earn over $2 a share in dividends within a few weeks. Eddie Levine said that his family was buying it, his sister, brother and girl friend were buying it and that Sol Fingar had bought the stock. Eddie Levine said the company was in mobile homes and that Sol Fingar had some buyers who bought the stock also and if Fingar and those others were buying it, it was a worthwhile buy. Berman bought a thousand shares at Hirsch & Company at around the end of October 1969 at 6-1/4. He sold this stock at 7-1/4 and 7-1/2 on November 3, 1969 (JA 894-897).

The following week Eddie Levine said to Berman "I heard you sold the stock." Eddie Levine told Berman that he was "very, very foolish because the stock was going to go up tremendously". Berman bought another thousand shares at $9 on November 10, 1969. The stock started going lower and lower, and around January 2, 1970 Berman bought 500 shares at 6-1/2 to "equalize" his investment. After the stock went down further in late January, Berman bought 500 more shares.

Allen Grant, a furrier, testified that in January, 1970 he had a meeting with Zuber, Howard and possibly Acton at the suggestion of Mike Gardner. Zuber offered to exchange some stock in Pioneer for fur coats, saying that it was a very good stock selling at about $6 at the time and "they intended it go very high". Grant agreed to take 6900 shares of Pioneer in return for coats valued at $42,000 and

Grant gave Zuber an option to buy back the stock in 60 days for $10 per share. On the day that Grant received the stock he asked defendant about Pioneer and defendant said he thought it was a very good company and he said he would like to buy some additional shares if he could get it at $3 a share (JA 915-917, 942).

Howard Nerenberg testified that he was self-employed as the owner of a knitwear production service. On about November 11, 1969, Nerenberg had a conversation with Robert Meyer, who recommended that Nerenberg purchase Pioneer stock.* Meyer said that Berman had recommended the stock to him. Nerenberg testified that on November 11 he purchased 500 shares at 8-7/8 and thereafter purchased an aggregate of 700 shares at prices ranging from 5-1/2 to 9. Some time later Meyer told Nerenberg that he had met with the President of the company and had been assured that there was nothing wrong with the stock, at which time Nerenberg purchased 200 more shares (JA 958, 957, 959-961).

Doniel Aymes, President of Alphabex Corporation, a contract job shop, testified that he had known defendant since 1967 or 1968. In or about October 7, 1969, defendant told Aymes that there would be a stock forthcoming on the market in the near future for him to buy. Aymes was told to purchase an aggregate of 2,000 shares for defendant's

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* This conversation took place before Meyer spoke to defendant. The importance of the sequence of these conversations is developed in Point II, infra.

account. Accordingly, Aymes bought 1,000 shares at $8.50 and another 1,000 shares at 8-3/4 on November 7 and November 10, 1969, respectively. Defendant told Aymes that the stock would have a meteoric rise in the near future. Aymes did not pay for the shares and when defendant failed to pay, Aymes had his broker, Walston & Company, contact defendant. Defendant paid Walston for the shares after having had two checks of his made out to Walston returned for insufficient funds (JA 963-968).

Stanley Schlager, a certified public accountant who had done personal accounting work for defendant, testified that in November 1969, defendant asked him to purchase some Pioneer stock, stating that Schlager should not worry about any losses that might occur on the stock, but that Schlager would have been able to keep the profit. Schlager purchased 1,000 shares and then 300 shares of Pioneer in November 1969. On cross-examination, Schlager said that he was purchasing the shares on behalf of defendant who promised to pay for them (JA 1031, 1028, 1032, 1029).

8. William Don Shephard

William Don Shepherd testified that in December, 1969 he was the sole stockholder of Pioneer Casualty Company and that at the suggestion of Michael Clegg he arranged for the exchange of $600,000 worth of Pioneer Casualty Company surplus debentures for 200,000 shares of Pioneer stock.

Shepherd told Clegg that the debenture was simply a promise to pay at some date to be determined wholly by the Board of Directors of Pioneer Casualty Company, and that it would only be payable when the Board voted to pay it (JA 941-943, 945).

9. Broker-dealer Witnesses

Gus Michael Kostos, a registered representative with Shearson, Hayden Stone, testified that in October 1969 he was a registered representative of Orvis Brothers. On October 24, 1969 defendant caused 20,000 shares of Pioneer to be delivered to Orvis Brothers for his account. Defendant requested that Kostos sell shares from this block directly into the accounts of three other individuals whom defendant had introduced to Orvis Brothers. These transactions were described as "crosses". On about December 5, 1969 a customer named Nat Farber told Kostos that he wanted to buy 1,000 or 2,000 shares of Pioneer from defendant's account. At about the same time, Kostos had similar conversations conversation with other customers named Friedman, Kroll and McCarthy, and similar transactions were entered into by them (JA 947, 950-952, 954).

On cross-examination, Kostos described the crosses as ordinary transactions. Kostos knew that Francine Zahl, in whose name one of the accounts was placed, was defendant's secretary (JA 972-973).

Robert W. Thomas testified that in 1969 he was employed with Thomas Investing Company ("Thomas") a registered broker-dealer which traded in over-the-counter stock. In late November 1969, defendant requested that Thomas purchase 2,500 shares of Pioneer in the name of Jeff Howard. Defendant's check for the purchases was returned twice for insufficient funds and Thomas resold the stock at about an eighth of a point higher than the price they had paid (JA 1003, 1005-1009).

Herman M. Solomon testified that in 1969 he was the President of a brokerage firm called Mann & Company ("Mann") located in Medford, Mass. In December 1969, defendant submitted purchase orders for Pioneer shares aggregating $3500. Several checks of defendant to the order of Mann were returned for insufficient funds. In April 1970, Solomon came to defendant's office in New York to demand payment and defendant gave Solomon 3,000 shares of stock of a different company. Defendant paid Mann a total of $36,250, and Mann obtained a judgment against defendant for a balance due of approximately $33,000 (JA 1013-1015, 1020, 1021, 1017-1019).

10. Michael Gardner

Michael Gardner, who was the principal of Gardner Securities, a brokerage firm, testified that he did a "nominal" amount of trading in Pioneer at defendant's request.

In December, 1969 Gardner introduced defendant to Michael Karfunkel, a broker who had been making a market in Pioneer in the pink sheets. Defendant agreed with Karfunkel that they would work together in trading the stock. Karfunkel also agreed to execute "directed" trades, which Gardner defined as trades "without any risk" to the brokers. Subsequently, defendant "directed" trades on two or three occasions through Economic Planning, Karfunkel's firm (JA 780, 784-786, 788).

At one point, defendant complained to Gardner that he was being "back-doored", in that stock was being sold into the market that was not supposed to be sold. Defendant said that some people he had been working with in Nevada had done the selling, and that defendant had to buy the stock. At Gardner's suggestion, defendant met with Howard, to whom defendant explained that defendant was looking for someone to straighten out his problem in Nevada. Later Howard told Gardner that he was getting everyone together to solve the problem. Howard subsequently called to say that he had had a meeting and things were in the process of being resolved. In late December, Zuber, who, according to Howard, was helping Howard clear up the situation, told defendant that the problem was in the process of being resolved, that Howard was picking up some stock certificates and no one was going to steal from defendant again (JA 789, 793-796, 798).

On cross-examination, Gardner testified that he had been convicted on federal securities laws violations and that he had not yet started to serve the sentences. Gardner was also named in five civil enforcement actions brought by the Securities and Exchange Commission charging securities frauds in which Gardner consented to injunctions. No money was paid to defendant in Gardner's presence as a result of the efforts of Howard and Zuber, and Gardner had no knowledge of whether defendant obtained any moneys as a result thereof. Defendant was purchasing Pioneer stock from mid-December 1969 through February 1970 and told Gardner about the mine on many occasions (JA 805, 804, 806, 809-816, 827, 819, 822-824).

On redirect, Gardner said that defendant engaged in one directed trade because he was buying Pioneer stock for which he could make no payment and he did not want the resulting sales of that stock to "hit the market generally" (JA 838, 839).

11. Michael Karfunkel

Michael Karfunkel testified that in the fall of 1969 he was a broker with Economic Planning Corporation. In 1969 Economic Planning was trading Pioneer stock at a profit. Azerrone of Karen had told Karfunkel that he had stock available, and if Karfunkel needed it Azerrone could make it available at one quarter of a point below the offering

price. In early January 1970, defendant told Karfunkel that Pioneer had substantial mercury properties, that the mine was dormant at that time but it would soon be reopened, by which time profits would be generated and the stock could be worth anywhere from $40 to $50 a share. Defendant wanted to know who was buying and selling the shares and asked Karfunkel whether he had bought any shares that had been sold by Hornblower & Weeks-Hemphill, Noyes ("Hornblower") in Chicago. Karfunkel said that he did purchase some of those shares, which defendant described as having resulted from "back-dooring" (JA 1033, 1064, 1065, 1035-1042).

Karfunkel testified about eight "directed trades" made by defendant in Pioneer stock in early 1970, whereby defendant made available to Karfunkel various amounts of Pioneer stock that defendant said were up for sale (JA 1045, 1046, 1048-1052).

On cross-examination, Karfunkel admitted that in a conference with the SEC on April 19, 1971 that dealt in part with Pioneer, Karfunkel had said nothing about "back-dooring" and "directed trades". Karfunkel was assured by the Government that if he told the truth he would not be prosecuted in the Pioneer case (JA 1062, 1063).

12. George T. Parris

George T. Parris testified that in October or November of 1969, he met with McKibbon and Scardino.

McKibbon said that he and Scardino had some Pioneer stock they wanted to sell but did not have any brokers. They offered to "discount the stock to [Parris] for cash." Parris arranged through his broker for a loan to finance Parris' purchase of the shares from McKibbon and Scardino, which loans would be repaid by selling the shares and applying the proceeds of the sale against the loan. On November 7, 1969 the proposed transactions were effected, whereupon Parris sold 5,000 shares of Pioneer, received a check for $36,459.50 and gave McKibbon a check for $32,350 from the proceeds (JA 728-731, 733, 734, 741).

13. Chart Concerning Trading in Pioneer

GX 146 was a chart that showed sales of Pioneer stock through defendant's account in his own name at Orvis Brothers and through the Francine Zahl accounts at Orvis and at Karen, together with records of deposits at Republic National Bank for the accounts of Bona Fide Productions and for defendant's account. A total of $335,426.59 representing checks issued on the various accounts at the brokerage firms was reflected on GX 146. On cross-examination, John R. Steinart, an investigator for the Securities and Exchange Commission who identified the various exhibits described above, testified that GX 146 did not purport to be an overall reconciliation of profit or losses with respect to defendant's trading in Pioneer (JA 1112, 1537).

B. Defendant's Case

1. Michael J. Grimes

Michael J. Grimes testified that he had been employed as a stockbroker with Grimes Hopper & Messer, a brokerage house in Los Angeles, in 1969-70. In the fall of 1969, Clegg visited Grimes and stated that he wanted to do some trading with him. About a week later, Grimes met with Clegg at his office and Clegg said that he had some close friends who were going to sell Pioneer stock in the near future. Subsequent to that conversation, Grimes sold various blocks of Pioneer stock on behalf of Clegg's close associates. Clegg, in fact, brought in some shares of Pioneer stock in the name of Jay Walker (JA 1139-47).

2. Stipulation

Defendant introduced a stipulation entered into with the Government that if Jay Walker were called, he would testify that in mid-December 1969, he sold 1,000 shares of Pioneer at $6.50 per share through an account at Grimes Hopper & Messer for the benefit of Michael Clegg and Burney Acton. The stipulation, together with the testimony of Michael Grimes, refuted Clegg's testimony that he was not the beneficial owner of a block of 1,000 Pioneer shares sold by Jay Walker. (JA 1148).

3. Myron Buttram

Myron Buttram's family was the owner of a patented process for extracting mercury from ore. On November 24, 1969 during a phone call placed by Acton, Buttram had a conversation with defendant. Buttram explained to defendant that his process was not a conventional process, that he had seen the property, and that it looked like a very good operational opportunity. On January 18, 1970 Buttram met defendant at a meeting in Los Angeles which was also attended by Acton and Clegg. Buttram showed defendant a brochure of what they had done and brought samples of other operations. The explanation given defendant at that time was that the pictures shown him demonstrated several types of mercury ore that were being extracted by use of simple milling and concentration from defendant's property. Buttram also discussed at this meeting the mill technique and the property. Buttram confirmed that the mill was a good operation and he felt it would be mechanically feasible and economical. (JA 1149, 1152-1154, 1157-1158.

ARGUMENT

POINT I

THE CIVIL INJUNCTION SHOULD NOT HAVE BEEN ADMITTED INTO EVIDENCE UNDER THE DOCTRINE OF "OPENING THE DOOR"

The trial court permitted the Government to introduce the entire text of a civil injunction entered against defendant in the Supreme Court of New York State on October 8, 1959 in an action entitled: The People of the State of New York vs. Alan Irving Segal and Alan Associates Securities Corp. (JA 1544). The injunction permanently enjoined defendant from engaging in any business relating to the purchase and sale of securities or commodities with the public and from acting in any other capacities related to the public sale of securities. The injunction also enjoined defendant from engaging in the business of broker or dealer in securities and further enjoined defendant from acting as agent, broker, salesman and various other capacities in connection with the sale to the public of any negotiable instruments of title, securities, evidences of interest or indebtedness.

The receipt of this document in evidence, under the doctrine of "opening the door," was reversible error. Careful scrutiny of Schiffman's testimony indicates that defendant's counsel did not "open the door" on cross-examination of

Schiffman to permit the Government to introduce the text of the civil injunction. Although the Government attempted on redirect to elicit testimony from Schiffman about the civil injunction, Schiffman did not connect it up with any subject matter that had been raised on cross. Accordingly, the injunction should not have been received because it had no probative value on any topic raised during cross-examination and was highly prejudicial to defendant. The error was seriously compounded by the prosecutor's overzealous argument regarding the injunction as well as his distorted statement of its contents.

On cross-examination Schiffman testified that defendant told him in the fall of 1963 that defendant used nominees because of the problem of creditors who might levy against assets in accounts under defendant's own name (JA 470-471). On redirect examination Government counsel asked Schiffman if he had ever discussed with defendant any bases other than creditors as to why defendant would use a nominee corporation. The witness replied that he could recall none. Government counsel then attempted to refresh Schiffman's recollection by showing him the injunction. Schiffman's response was that he knew about the injunction, but he was "not sure" whether it had ever been discussed in relationship to Kelli, Jackson & Scott (JA 476). Schiffman said

that defendant "mentioned" the injunction to him, but they "never went into too much detail about it" although Schiffman had some knowledge of it. When asked what conversation he had with defendant about it, Schiffman said that defendant had told him that at one time he had a problem with the SEC in relation to a brokerage company, but that he never went into too much detail about it, and that they had discussed the fact of the injunction "in a limited way at various times." The injunction was received over objection. (JA 476-478).

Counsel for the Government read the entire injunction to the jury and argued in summation that defendant used nominees ". . . so investigators would be thrown off the track in the event that somebody came after him to catch him at what he was doing. . ." (JA 1333); that "[defendant] used nominees to throw off the investigators . . . (JA 1334) and that:

> "[defendant] couldn't operate in the open because of the permanent injunction. He had been permanently enjoined by the New York Supreme Court in the State of New York from transacting in securities. He was using nominees to hide that fact, to hide the fact of his present conduct, so that he would not be found to be in contempt of that injunction.
>
> "He knew that by every move that he made with securities he was violating an injunction, acting unlawfully. This is the man who comes before you now, by Mr. Doyle, and argues good faith, innocent intent." (JA 1338)

* * *

At the close of the Government's summation, counsel for defendant objected to it on the ground that the prosecutor had argued that defendant had violated the injunction, which argument was beyond the scope of the purpose for which the injunction was received. (JA 1834) The Court granted defendant's request to charge on the civil injunction, instructing the jury that the injunction was not criminal; that defendant was not charged with violating it; and it was received solely to establish that defendant may have used nominees because of the injunction. (JA 1393, 1394, 1629)

Because Schiffman never testified that he had discussed the injunction with defendant on the subject of the use of nominees, it was obviously incorrect to conclude that the door had been opened to its receipt in evidence, and the objection of defendant's counsel should have been sustained.

The doctrine of "opening the door" is succinctly set forth in United States v. Littwin, 338 F.2d 141 at 145-46 (6th Cir. 1964):

> "The general rule is that if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse

> inferences which might arise from the incomplete character of the evidence introduced by his adversary. . . . But this rule is subject to the qualification that only the other parts of the document which are relevant and throw light upon the parts already admitted become competent upon its introduction. There is no rule that either the whole document, or no part of it, is competent."

In United States v. Corrigan, 168 F.2d 641 (2d Cir. 1948), this Court reversed a conviction upon a finding that certain documentary evidence was admitted upon an improper application of the "Opening the Door" doctrine.

In Corrigan, defendant was employed by the Navy as an inspector of the plants of government contractors, and was charged with using that position to induce such contractors to use the services of Corrigan, Osburne & Wells, a business from which he was receiving a salary.

Upon the inspection of one such contractor, Vickers, Inc., Corrigan criticized its management and production in his report to the Navy and told the plant manager that his problems were caused by failure to utilize the services of Corrigan, Osburne & Wells. As a result of Corrigan's report, Vickers, Inc. lost its high government rating. Mr. Vickers, the president of Vickers, Inc., then caused an internal investigation to be made of his company's production and management which

revealed that Corrigan's report to the Navy was baseless.

A letter from Vickers, Inc. to the Navy based on this investigation and answering Corrigan's charges was introduced on direct examination by the Government of the President of Vickers, Inc. On cross-examination, Vickers was asked about the details of the investigation and testified that it was conducted by two employees, Allen and Herman, who had prepared two separate reports, each highly critical of Corrigan's report to the Navy. On re-direct the Allen and Herman reports were admitted into evidence on the ground that Corrigan's counsel opened the door by cross-examining Vickers as to the investigation and asking him what recommendations were made by the investigators.

The Court set forth the doctrine of "Opening the Door" (168 F.2d at 645):

> "The doctrine of 'opening the door' is an application of the principle of 'completeness'; that is, if one party to litigation puts in evidence part of a document, or a correspondence or a conversation, which is detrimental to the opposing party, the latter may introduce the balance of the document, correspondence or conversation in order to explain or rebut the adverse inferences which might arise from the fragmentary or incomplete character of the evidence introduced by his adversary."

* * *

> "'[The rule] is protective, merely. It goes only so far as is necessary to shield a party from adverse inferences, and only allows an explanation or rebuttal of the evidence received.'"

In reversing the conviction, the Court found that the doctrine "cannot properly be invoked in the case at bar to support the introduction of the "[investigation reports]." The Court held that nothing in Vicker's testimony "on cross-examination concerning the investigation be initiated or the recommendations made to him by [the investigators] required supplementation to make them clearly understandable" (Id. at 645):

> "[T]o admit the reports. . . on the theory that the defense 'opened the door' by cross-examination would extend the doctrine beyond any authorities that have come to our attention and beyond the reasons which support it. That the reports contained prejudicial expressions of opinion as to Corrigan's bias and motives needs no argument. Whether in fact the reports influenced the jury's verdict is of course, unknown and is immaterial, for an accused is entitled to have incompetent, prejudicial evidence excluded from the jury's consideration."

See also, United States v. McCorkle, 511 F.2d 482 at 486-87 (7th Cir. 1975); accord, United States v. Gruneweld, 164 F. Supp. 644 (S.D.N.Y. 1958); Camps v. New York City Transit Authority, 261 F.2d 320 at 322 (2d Cir. 1958); United States v. Dennis, 183 F.2d 201 at 229-30 (2d Cir. 1950), aff'd, 341 U.S. 494 (1951).

In Hurst v. United States, 337 F.2d 678 (5th Cir. 1964), defendant's conviction for violation of the Internal Revenue Code for dealing in non tax-paid whiskey was reversed upon a finding that improper evidence relating to prior offenses of defendant were admitted into evidence.

Upon cross-examination of a key Government witness, counsel for Hurst asked: "You knew that Joe Hurst had absolutely no criminal record, didn't you?" To which the witness, Kennington, answered: "I didn't know." The government then introduced evidence not only of a sentence imposed on Hurst and a plea of guilty in unrelated cases but also copies of six indictments, several of which had been abandoned by the filing of a nolle prosequi. In reversing the conviction, the Court found that although the question was irrelevant and improper because it suggested falsely that Hurst had no criminal record, counsel for Hurst had not opened the door to the fact that Hurst had been indicted (but not convicted) six times. The Court stated:

> "and the further fact that it may well have left the impression in the minds of the jurors that Hurst had had no brushes with the criminal law, does not, on the other hand, open up the flood gates to permit the Government to prove specific criminal acts or criminal charges for the consideration by the jury in their resolving the one issue in the case: Was Hurst guilty of the offenses charged on this indictment?"

> "There is probably no better known rule of common law criminal practice than that courts are careful to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Michelson v. United States, 335 U.S. 469, 475, 69 S.Ct. 213, 93 L.Ed. 168."

Id. at 680

Under the doctrine of "opening the door" as the Courts have developed it, the Government would have been permitted to introduce competent evidence that defendant had reasons for the use of nominees other than the one he stated to Schiffman, but no such evidence was offered. Instead the Government offered the complete text of an injunction through Schiffman who did not connect it in his testimony to any conversation with defendant about nominees.

(a) The Erroneous Receipt Of The Injunction Was Highly Prejudicial To Defendant

It would be difficult to overstate the impact on the jury of having the sweeping terms of the injunction read to them by the prosecutor: from its broad language the jury could not avoid drawing the inference that defendant had previously engaged in a securities fraud. The prejudice was compounded by the prosecutor's summation. Not only did the prosecutor emphasize the injunction as a reason for defendant's use of nominees, but injected

into the case the issue of defendant's violation of the injunction. The latter accusation was not mentioned in the indictment, and it clearly was beyond the scope of the subject matter for which the injunction was received by the trial court. The Court's limiting instruction pointed out the error, but it would have been impossible to erase from the jury's minds and deliberations the vivid arguments of the prosecutor.

(b) The Prosecutor Misstated The Terms Of The Injunction

Finally, the prosecutor distorted the provisions of the injunction itself by telling the jury that defendant had been prohibited from "transacting in securities." The injunction did not contain such a prohibition, but prohibited defendant from engaging in the business of buying and selling securities with the public, and from acting as a broker or dealer. For this reason as well, defendant is entitled to reversal of his conviction and to a new trial at which the injunction would be excluded from evidence.

POINT II

THE HEARSAY STATEMENTS OF EDDIE LEVINE, AN ALLEGED CO-CONSPIRATOR, AND THE TESTIMONY OF OTHER WITNESSES LINKED TO EDDIE LEVINE, SHOULD HAVE BEEN STRICKEN BECAUSE EDDIE LEVINE WAS NOT SHOWN TO HAVE BEEN CONNECTED TO THE CONSPIRACY PROVEN AT TRIAL

The indictment named Jack Levine as a defendant in the conspiracy count and in various substantive counts, and it named his son Eddie Levine as an unindicted co-conspirator.* The evidence as to Eddie Levine consisted of the testimony of Sol Fingar and Abner Berman, to both of whom Eddie Levine had recommended Pioneer stock. On the basis of their testimony, the testimony of Howard Nerenberg was received against defendant, since Nerenberg had talked to Robert Meyer (before Meyer talked to defendant) and Meyer in turn had talked to Abner Berman who had talked to Eddie Levine. The only evidence linking Eddie Levine to the named defendants was Berman's testimony that Eddie Levine said that his father and some others were in on some stock deals and that Pioneer would earn over $2 a share within a few weeks. At the end of the Government's

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*Eddie Levine was deceased at the time of trial.

case, the Court entered judgments of acquittal as to Jack Levine in all counts in which he was named. (JA 1134-1138)

At the close of the evidence, defendant's counsel moved to strike the testimony of Fingar, Berman and Nerenberg, but the motion was denied on the ground that there was "sufficient evidence" to link Eddie Levine to the conspiracy. (JA 1170-1171) The trial court erred in finding that such evidence existed. Once the Court had concluded that there was no sufficient evidence to hold Jack Levine in the case, the only link between Eddie Levine and the named defendants disappeared.

In United States v. Cafaro, 455 F.2d 323 at 326 (2d Cir.), cert. denied, 406 U.S. 918 (1972) this Court set forth the co-conspirators' exception to the hearsay rule which allows hearsay statements of a co-conspirator to be admissible against a defendant.

> "The determination of whether hearsay declarations are admissible under the 'co-conspirator' exception to the hearsay rule does not rest on finding sufficient evidence to submit a charge of conspiracy to the jury with respect to either the declarant or the defendant against whom the declarations are offered. Rather, the threshold question is whether the Trial Judge could conclude, after all the evidence is in, that the prosecution had established the declarant's and the defendant's participation in the conspiracy "by a fair preponderance of the evidence independent of the hearsay utterances." (emphasis added, footnote omitted)

Accord, United States v. Lopez, 420 F.2d 313, 317-18 (2d Cir. 1969).

This rule has also been adopted by other circuits as well. For example, in United States v. Rodrigues, 491 F.2d 663 at 666 (3rd Cir. 1974) the Court of Appeals for the Third Circuit stated:

> "In order to be properly admitted under the co-conspirator exception to the hearsay rule, there must be independent evidence linking the declarant to the defendant [in a conspiracy]."

Defendant was seriously prejudiced by the trial court's erroneous refusal to strike the testimony of Fingar, Berman and Nerenberg. First, all of the investor witnesses in the case were sophisticated businessmen. Many of them knew defendant personally. Fingar, Berman, Nerenberg and Meyer were the only witnesses who were unacquainted with defendant and who could thus arguably be classified as members of the general public who bought Pioneer stock. By incorrectly permitting the testimony of all these witnesses to go to the jury as against defendant, the trial court facilitated the Government's argument that the case represented a major fraud on the public. (JA 160; 1294) Second, the erroneous receipt of the testimony of Fingar, Berman and Nerenberg permitted the exaggerated claims made by Eddie Levine about Pioneer to be considered by the jury against defendant. For instance, it was Eddie Levine who allegedly said that Pioneer would earn over $2 a share

within a few weeks, that various relatives of his were buying the stock, that Fingar had buyers who were buying it, and that Berman had been "very foolish" to sell his stock.

Since the trial court's error in failing to strike the challenged testimony was highly prejudicial, this Court should reverse and remand for a new trial at which this evidence would be excluded from the jury's consideration.

POINT III

THERE WAS A MATERIAL VARIANCE BETWEEN THE INDICTMENT WHICH CHARGED ONE SINGLE CONSPIRACY AND THE PROOF WHICH INDICATED TWO SEPARATE CONSPIRACIES REQUIRING REVERSAL OF THE CONVICTION ON ALL COUNTS AND A DIRECTION THAT A JUDGMENT OF ACQUITTAL BE ENTERED

The indictment charged a single overall conspiracy to sell Pioneer stock at artificially inflated prices, but the proof was of the following:

(A) A conspiracy among defendants, Acton, Azzerone, Clegg and the co-conspirators Gardner, Karfunkel and Schiffman to sell Pioneer shares;

(B) A conspiracy among Clegg, Acton, McKibbon and Scardino to sell Pioneer shares.

Not only was conspiracy B a wholly different enterprise from conspiracy A, but according to the Government's own theory of the case, it was contrary to a promise made to defendant by Acton and Clegg (not charged in the indictment) that they would not sell Pioneer shares. This promise was in fact the very foundation of that conspiracy. Defendant's lack of any involvement or participation in conspiracy B was made even clearer by the receipt of the testimony of Gardner, Acton and Clegg concerning defendant's alleged efforts to bring conspiracy B to a halt because it was contrary to the promise made to him by Acton and Clegg. Despite the separate nature of conspiracy B, all of the evidence concerning its formation and carrying out was received against defendant. If the indictment had been properly framed so as to be in accord with the evidence, each conspiracy would have been separately charged and the proof received under each conspiracy count explicitly limited to that count in the Court's instructions to the jury.

Where an indictment charges one overall conspiracy and the proof offered at the trial establishes separate and individual conspiracies, the conviction should be reversed upon a showing that the variance affected substantial rights. United States v. Calabro, 467 F.2d 973 at 983 (2d Cir. 1972), cert. denied, 410 U.S. 926,

rehearing denied, 411 U.S. 941 (1973):

> "'[T]he test for reversible error, if two conspiracies have been established instead of one, is whether the variance affects substantial rights. [citations omitted] The requirements for sustaining a verdict in which there has been a variance have been met when there is no double jeopardy problem and no issue of unfair surprise deriving from the proof of two conspiracies rather than one (Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)), and when '[t]he several conspiracies, if there had been such, could have been joined in a single indictment or consolidated for a single trial and the conduct of the trial was such that the danger resulting from the admission of evidence not chargeable to any appellant was minimal.' United States v. Agueci, supra, 310 F.2d at 827."

See also United States v. Agueci, 310 F.2d 817 at 827 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963); United States v. Vega, 458 F.2d 1234 at 1236 (2d Cir. 1972).

In United States v. Russano, 257 F.2d 712 (2d Cir. 1958), the defendants were convicted of conspiracy to traffic in narcotics. On appeal, the Second Circuit reversed and remanded the conviction in that the indictment charged a single continuing conspiracy and the evidence established two separate conspiracies, one in 1952 and the other from 1955 to 1956 and resulted in prejudicial variance. The Court found that the prejudice was caused by the admission of evidence relating to one conspiracy to prove the other conspiracy (Id. at 715-16):

> "The defendants maintain that no continuing conspiracy was proved, that a variance existed between the indictment and the proof. The Government does not deny that if the evidence failed to establish a single conspiracy, but established the existence of two conspiracies, one in 1952 and another in 1955-56, the appellants were prejudiced thereby. Nor could it be otherwise. If appellants had been tried only for the 1952 conspiracy, the admission of evidence relating to the later conspiracy of 1955-56 would have constituted prejudicial error. Similarly, if they had been tried for the later conspiracy, evidence of earlier illegal acts would have been seriously prejudicial. Whether or not a variance is prejudicial is a judgment that must be made on the facts of each case."

See also United States v. Bostic, 480 F.2d 965 (6th Cir. 1973); United States v. Butler, 494 F.2d 1246 (10th Cir. 1974); United States v. Cruz, 478 F.2d 408 at 413-14 (5th Cir.), cert. denied, 414 U.S. 910 (1973); Brooks v. United States, 164 F.2d 142 at 143 (5th Cir. 1947).

While the trial court charged the jury that it should acquit the defendants if it found separate and independent agreements unrelated to one central plan or scheme or common purpose, this instruction could not erase from the jury's mind and deliberations the prejudicial effect of receiving against defendant all of the evidence of conspiracy B. In this connection it is important to note that overt acts 4, 5, 6 and 7 clearly relate only to conspiracy B. (JA 1450)

Finally, the Court's charge on multiple conspiracies was incorrect in that the Court stated that the jury could find a single conspiracy if:

> ". . . you find beyond a reasonable doubt, that two or more of the defendants in some way or manner came to a mutual understanding to accomplish the broad objectives set out in the indictment." (JA 1451)(emphasis added)

The jury might well have found that Acton and Clegg, since they were common members in both conspiracies ". . . came to a mutual understanding to accomplish the broad objectives set out in the indictment", and thus have concluded that a single conspiracy existed. Defendant, however, could clearly not have been a member of such single conspiracy since he was in no way connected with conspiracy B.

This Court should also reverse the conviction of defendant on all substantive counts on which he was convicted since the Court charged the jury that it could find defendant guilty on any or all of the substantive charges if it found that he was a member of the conspiracy and that the relevant substantive offenses were committed pursuant to the conspiracy (JA 1458).

POINT IV

THE INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE OF UNNECESSARY AND PREJUDICIAL DELAY IN PRESENTING THE CASE TO THE GRAND JURY

The indictment was filed more than four and one-

half years after the last overt act alleged to have been committed in furtherance of the conspiracy (Count 46) even though the facts were known to the Securities and Exchange Commission in early 1970 and an investigation commenced at that time. The Securities and Exchange Commission brought a civil action in this matter which was disposed of in the Spring of 1971. (JA 80-81) The Criminal Reference Report was dated in December 1971, and the case came to the attention of the United States Attorney in June of 1972. The investigation by the United States Attorney's Office commenced in the Fall of 1972, then was dropped and re-commenced in the Fall of 1973. (JA 89)(JA 80-81; 89, 99-100)

Defendant was substantially prejudiced by the unnecessary delay in presenting the case to the Grand Jury by reason of the fact that the "due diligence" file furnished to defendant in 1970 and on which he relied was not preserved intact and only one part of it was available at trial. The original file had included the Hatsis Report detailing prior offers made by the Hughes organization to purchase the mining properties, but this Report had disappeared by the time of trial. The due diligence file had been given by Schiffman to Azzerone who in turn gave it to the Securities and Exchange Commission. The

original due diligence file would have furnished concrete corroboration of defendant's defense that he relied in good faith on the representations and material furnished to him about Pioneer.

In addition, defendant was prejudiced by the hazy recollection of the key Government witnesses, Clegg, Acton and Gardner, as well as by the fact that Eddie Levine, the named co-conspirator who was the missing link between defendant and various Government witnesses, was deceased by the time of trial.

At the close of the Government's case, counsel for defendant renewed his motion for dismissal based on prejudicial delay in presenting the case to the Grand Jury. This motion was also renewed at the close of the case. (JA 1117, 1171)

In United States v. Marion, 404 U.S. 307 (1971), the Supreme Court held that the Due Process Clause may provide a basis for dismissing an indictment due to pre-indictment delay by the Government "where actual prejudice to the conduct of the defense" is shown or "that the Government intentionally delayed to gain some tactical advantage over [defendants] or to harass them." (Id. at 325)

As to the possibility of lost evidence or the memories of witnesses becoming hazy due to the delay,

the Court added (Id. at 325-26):

> "Appellees rely solely on the real possibility of prejudice inherent in any extended delay: that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature." (emphasis supplied)

See also United States v. Dornau, 356 F. Supp. 1091 (S.D.N.Y. 1973); United States v. Feinberg, 383 F.2d 60 at 65-66 (2d Cir. 1967); United States v. Iannelli, 461 F.2d 483 (2d Cir.), cert. denied, 409 U.S. 980 (1972); United States v. Briggs, 457 F.2d 908 at 911 (2d Cir.), cert. denied, 409 U.S. 986 (1972); United States v. Wilson, 357 F. Supp. 619 (E.D.Pa. 1973), appeal dismissed, 492 F.2d 1345 (3d Cir. 1973), rev'd on other grounds, 43 U.S.L.W. 4301 (1975) and United States v. Harmon, 379 F. Supp. 1349 (D.N.J. 1974).

POINT V

CROSS-EXAMINATION OF THE WITNESS MICHAEL CLEGG WAS IMPROPERLY CURTAILED WITH RESPECT TO THE NATURE OF HIS PRIOR FEDERAL FELONY CONVICTION

On cross-examination of Michael Clegg by defendant's counsel, Clegg testified that on March 28, 1974 he had been found guilty on thirteen counts of wire fraud by a Federal

jury in Houston, Texas, and on April 26, 1974, was sentenced to serve a term of five years imprisonment on this conviction. Clegg denied that the conviction had to do with using certain devices to obtain free long distance telephone service from the telephone company but the Court sustained the Government's objection to counsel's question as to what the conviction did involve. This curtailment of the cross-examination of Clegg was erroneous since the jury was entitled to know the nature of the conviction beyond the simple classification of the statute involved. Curtailment of this line of inquiry was highly prejudicial since Clegg's credibility was a key issue of fact for the jury, particularly because Clegg was shown to have lied on cross-examination when he denied that he sold one thousand shares of Pioneer stock that were registered in the name of Jay Walker (an act that Clegg was charged with in Count I of the indictment)(JA 644, 646-48, 12).

The credibility of a witness may be impeached by questioning him as to prior convictions, including the nature of the act which resulted in the conviction. This rule is explained in Richardson, Evidence §518 at 525-526 (9th ed., Prince 1964):

> "The fact that the witness had been convicted of a crime 'may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record."

* * *

"An admission by the witness on cross-examination that he had been convicted of a crime does not preclude the cross-examiner from questioning the witness further to establish the criminal act which was the basis of the conviction. 'Since a witness may be examined properly with respect to criminal acts have that [sic] escaped prosecution, there is no reason why indictment followed by conviction should proscribe inquiry as to what those acts were.' People v. Sorge, 301 N.Y. 198, 201, 93 N.E. 2d 637, 639. See also, Moore v. Leventhal, 303 N.Y. 534, 538, 104 N.E. 2d 892, 894."

This view appears to have been adopted in the Second Circuit as well, by this Court's discussion of the issue in cases involving acts of misconduct which have resulted in convictions. In United States v. Kahan, 479 F.2d 290 (2d Cir. 1973), rev'd on other grounds, 415 U.S. 239 (1974), the Court, in allowing the defense attorney to cross-examine twelve of sixteen government witnesses concerning their false statements on visa applications, stated the general rule (Id. at 294):

"[A] witness' acts of misconduct are not admissible to impeach his credibility unless the acts results in a conviction. (emphasis added)

This rule was also set forth in United States v. Sposato, 446 F.2d 779 at 780-81 (2d Cir. 1971):

"'[I]t is settled that in a trial a witness' acts of misconduct are not admissible to impeach his credibility unless the acts resulted in the obtaining of a conviction.' [citations omitted]

In accord is United States v. Bowe, 360 F.2d

1 (2d Cir.), cert. denied, 385 U.S. 961 (1966), where the Court held (Id. at 15):

> "[I]n this circuit, 'specific acts of misconduct not resulting in conviction of a felony or crime of moral turpitude are not the proper subject of cross-examination for impeachment purposes.' (citation omitted)(emphasis supplied)

See also, United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973); United States v. Semensohn, 421 F.2d 1206 (2d Cir. 1970).

The Fourth and Fifth Circuits have ruled more explicitly on the degree to which counsel should be permitted to inquire about a witness' prior criminal acts. In United States v. Miller, 478 F.2d 768 (4th Cir. 1973), the Court found reversible error in the refusal of the trial court to allow defense counsel to cross-examine an important government witness whose credibility was a material issue in the case as to the nature of his prior conviction (Id. at 769-70):

> "'Prior criminal convictions for felonies or misdemeanors involving moral turpitude ordinarily constitute material impeaching evidence,'
>
> * * *
>
> "[T]he district court should [not] have refused to permit interrogation about the time and place of conviction, the nature of the offense, and the punishment imposed."

In Beaudine v. United States, 368 F.2d 417 (5th Cir. 1966), the Fifth Circuit held that it was

reversible error to limit cross-examination of the government's key witness as to his prior convictions. The Court stated that the nature of the crimes were material since "some types of crimes have more immediate direct bearing than others on the elements of veracity", 368 F.2d at 421. The Court added that limiting the examination of the witness to the fact that he had been convicted of fraud against the FHA was insufficient and this key witness (Id. at 424):

> "[W]as not exposed to the truth-revealing pressures of the sort of cross examination which is really the heart of our adversary system." (footnote omitted)

See also, Tucker v. United States, 409 F.2d 1291 (5th Cir. 1969); Sears v. United States, 490 F.2d 150 (8th Cir.), cert. denied, 417 U.S. 949 (1974).*

In the case at bar the trial court's refusal to allow defendant to establish that Clegg was convicted of theft of services against the phone company by the use of electronic devices, a crime involving mendacity as well as moral turpitude, was reversible error.

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*Rule 609 of the Federal Rules of Evidence codifies the existing decisional law with respect to the type of conviction that may be inquired into, but does not furnish any specific guidelines as to how far counsel may go in inquiring into the nature or facts of the conviction. See Advisory Committee notes on Proposed Rules, Rule 609, F.R.E.

CONCLUSION

For the reasons set forth in Points III and IV, supra, this Court should reverse and remand the case with a direction that a judgment of acquittal be entered as to defendant on all Counts in which he was named. In the alternative, the Court should reverse and remand the case for a new trial to be conducted free of the errors set forth in Points I, II and V, supra.

Respectfully submitted,

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Scott B. Lunin
Robert P. Reichman

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- *against* -

HOWARD FINKELSTEIN, etal.,

Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th, Street, New York, New York

That on the 3d *day of* July *1975 at* 1) 36 E. 44th St., N.Y. N.Y., 2) 770 Lexington Ave, N.Y., N.Y. 3)1 St. Andrews Place, N.Y., N.Y.

deponent served the annexed Brief *upon* 1) Eleonor Jackson Piel 2) Irving L. Weinberger 3) Paul J. Curran

the Attorneys *in this action by delivering* 2 *a true copy thereof to said individual s personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 3d
day of July *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James Steele

JAMES STEELE

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

- against -

HOWARD FINKELSTEIN, etal.,

Appellants.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*

1235 Plane Street, Union, N.J. 07083

That on the 3d *day of* July *19* 75 *, deponent served the annexed* Brief

upon Kirschner & Greenberg *attorney(s) for*

Appellant Zuber *in this action, at* 10850 Wilshire Blvd, Los Angeles, Cal.

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* es *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 3d
day of July *19* 75.

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS